(1) Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

HOWARD MITCHELL MCCAIN, JR.,

Petitioner,

v.

THE CITY OF LAFAYETTE, KENNETH BOWEN, AROS MOUTON AND JOHN R. RAINES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

R. SCOTT ILES
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5788

QUESTIONS PRESENTED

(1) Whether the Louisiana Appellate Court erred in its evaluation of whether Howard McCain's "legitimate reason for dismissal was a pretext" pursuant to this Honorable Court's analysis in O'Connor v. Consolidated Coin Caterers Corporation, 517 U.S.2d 308, 116 S.Ct. 1307 (1996).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the Supreme Court of Louisiana to review the merits appears at Appendix A to the petition and is has been designated for publication but is not yet reported; The opinion of the Third Circuit Court of Appeal appears at Appendix B to the petition and has been designated for publication but is not yet reported.

JURISDICTION

The date on which the Supreme Court of Louisiana decided my case was September 17, 1999. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is a federal question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) Age Discrimination in Employment Act of 1967

(2) 29 USCA Section 621, et seq.

(3) United Constitution, Fourteenth Amendment

STATEMENT OF THE CASE

The procedural history of this matter will be set out separately from the factual history.

PROCEDURAL HISTORY

Howard McCain filed a Petition for Damages under the Age Discrimination in Employment Act and under the Louisiana Age Discrimination in Employment Act on August 25, 1995, complaining that his employment with the City of Lafayette from 1978 until 1995 was terminated within a few short months of retirement, thus costing him tens of thousands of dollars of benefits, and complaining that the motivating factor behind his termination was his age.

Originally, the district court scheduled Mr. McCain's trial for November 12, 1997. However, the defendants filed a Motion to Continue the trial on September 15, 1997, and the Court granted the motion.

Howard McCain again moved to fix this matter for trial in April, 1998. The Court did so setting the case for a bench trial on November 10, 1998 at 10:00 a.m.

The Court directed the parties to file any dispositive motions before June 15, 1998. However, as that deadline approached, the defendants sought a thirty day extension to file any dispositive motions, and this request for an extension was granted. The defendants were given until July 15, 1998 to file any dispositive motions.

On the day before the deadline, the defendants filed a Motion for Summary Judgment noting "...that plaintiff will be

unable to satisfy his evidentiary burden at trial", but filed no supporting evidence or legal memorandum.

Pursuant to the Local Rules of Court for the Fifteenth Judicial District Court and specifically Rule 23(A), the defendants were to submit a memorandum within seven working days prior to the hearing on the Motion for Summary Judgment. The defendants filed their memorandum on September 11, 1998, which was ten calendar days and seven working days prior to the hearing.

In the Motion for Summary Judgment, the defendants argued: (a) individual defendants are not susceptible to civil prosecution under the Louisiana Age Discrimination in Employment Act comparing similar conclusions made by the United States Fifth Circuit Court of Appeal, citing Stultz v. Conoco, 76 F.3d 651 (5th Cir., 1996), (b) the Civil Service Commission provides exclusive remedies for Howard McCain, and thus his rights under the Louisiana Age Discrimination in Employment Act and the Age Discrimination in Employment Act are thus thwarted by its jurisdiction, and (c) the plaintiff cannot prove his case on the merits.

The district court entertained this Motion for Summary Judgment on September 21, 1998. At that time, the Court indicated that it would grant the Motion for Summary Judgment as to the individual defendants under Stultz, and would take under advisement the issue of whether the Civil Service Commission has exclusive jurisdiction for the claimant, thus displacing a claim under the Age Discrimination in Employment Act and the Louisiana Age Discrimination in Employment Act. The following day, on September 22, 1998, the Court entered a Minute Entry which

provided as follows:

> "**MINUTE ENTRY**
>
> This matter is before the Court on a Motion for Summary Judgment by defendants. The matter was set for hearing on September 21, 1998. After granting summary judgment in favor of all individual defendants, the Court took the issue of summary judgment as to the City of Lafayette under advisement.
>
> This suit arises out of a claim by a plaintiff that he was wrongfully discharged from his employment with the City of Lafayette due to age discrimination. The plaintiff initially appealed his termination to the Lafayette Municipal Government Employees Civil Service Board. This appeal was unsuccessful with the Civil Service Board holding the plaintiff's termination was 'in good faith' and for 'cause'. Plaintiff failed to appeal the board's decision. After delays for appeal had run, the plaintiff filed the instant suit.
>
> The Court finds that it lacks jurisdiction to hear the instant suit. Under Article 10, Section 12 (B) of the Louisiana Constitution of 1974, a Civil Service Board has exclusive original subject matter jurisdiction over all removal and disciplinary cases. Myers v. Ivey, 635 So.2d 632 (La. App., 3rd Cir., 1994); Eubanks v. City of Opelousas, 590 So.2d 740 (La. 3rd Cir., 1991).

Plaintiff's case involves his alleged wrongful removal from a position with the City of Lafayette; therefore, the Lafayette Municipal Government Employees Civil Service Board has exclusive original subject matter jurisdiction over his case. Since plaintiffs failed to raise the issue of age discrimination in front of the Civil Service Board he cannot be allowed to now raise it for the first time in front of this Court.

Plaintiff argues that this is not an appeal from the Civil Service Board decision but an independent action seeking money damages which cannot be awarded by the Civil Service Board. However, in order for a State employee to maintain a suit for money damages in district court based upon his wrongful termination, he must first be successful in appealing his dismissal to the Civil Service Board. Reimer v. Medical Center of Louisiana at New Orleans, 688 So.2d 165 (La. App., 4th Cir., 1997); Hillard v. Housing Authority of New Orleans, 436 So.2d 685 (La. App., 4th Cir., 1983). Plaintiff was not successful in his appeal; therefore, cannot bring suit for damages based upon his termination before this Court.
Considering the foregoing, the Court hereby grants the summary judgment as to the City of Lafayette. Judgment will be signed upon presentation; costs to be paid by plaintiff.

Officially entered in chambers at Lafayette, Louisiana this 22nd day of September, 1998. Signed Edward D. Rubin, Judge, Division D."

On September 25, 1998, a Judgment was entered in conformity with the Court's Minute Entry.

On October 5, 1998, the plaintiff filed a Motion and Order for Devolutive Appeal which was granted the following day.

Then the matter was properly before the Third Circuit Court of Appeal.

On January 11, 1999, Howard McCain filed his original brief with the Third Circuit Court of Appeal.

On February 8, 1999, after seeking one extension, the defendant filed its original brief with the Third Circuit Court of Appeal.

On April 1, 1999, oral argument was held in the Third Circuit Court of Appeal.

Thereafter, on May 5, 1999, the Court of Appeal entered its decision which consisted of a nineteen page original opinion authored by Judge Amy and Judge Gremillion, and a one page dissent by Judge Peters.

The net effect of the decision of the Court of Appeal was to affirm Judge Rubin's reasoning for the dismissal of the individual employees, noting the conformity of Louisiana

courts with federal jurisprudence in discrimination cases, thus relying on Stultz v. Conoco, supra, as the basis for its decision.

As to the exclusive jurisdiction of the Lafayette Municipal Government Employees Civil Service Board, the Court of Appeal in essence reversed Judge Rubin finding that the district court was appropriate jurisdiction for a claim under the Age Discrimination in Employment Act and the Louisiana Age Discrimination in Employment Act, with its subject matter jurisdiction analysis being the bulk of its opinion, from page seven of the opinion until page fifteen of the opinion.

However, the Third Circuit Court of Appeal went on to address the merits of the Motion for Summary Judgment in that the defendants claimed that the plaintiff would not be able to carry his burden of proof, which was an issue never reached by the district court. The reasoning of the Third Circuit Court of Appeal is found from page fifteen to page nineteen. Since that is the issue that forms the basis and essence of this writ application, that analysis is repeated herein as follows:

> "**Summary Judgment - Genuine Issues of Material Fact**
>
> In their memorandum in support of summary judgment and again in their brief to this court, the defendants argue that the plaintiff will be unable to carry the requisite burden of proof to recover for age discrimination. Principally, they maintain that no genuine issues of material fact remain with regard to whether McCain was discharged due to his age.

As previously explained, La. Code Civ.P. art. 966 (C)(2) provides that a movant who will not be required to bear the burden of proving the issue before the court at trial, is not required, in a motion for summary judgment, ' to negate all essential elements of the adverse party's claim, act or defense...' Rather, the movant must only 'point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense.' Id. After the movant has satisfied this burden, the adverse party must produce adequate factual support establishing that genuine issues of material fact exist for trial. La.Code Civ.P. art. 966 (C)(2); La.Code Civ.P. art. 967.

In Taylor, 95-388; 663 So.2d 379, this court set forth the elements of an age discrimination suit by referencing those of the comparable federal statute. At the time of Taylor, a plaintiff was required to demonstrate that:

(1) he was in the protected age group between the ages of forty and seventy,
(2) his employment with the defendant was involuntarily dismissed;

(3) he was qualified to perform the job that he was employed to perform, and
(4) he was replaced by a person outside the protected age group comprising individuals between the ages of forty and seventy.

Id. at p 9; 384, quoting Lege v. N.F. McCall Crews, Inc., 625 So.2d 185, 187 (La. App. 3 Cir.)(citing Belanger v. Keydril Co., 596 F.Supp. 823 (E.D. La. 1984)), writ denied, 627 So.2d 638 (La. 1993). Reference to recent federal jurisprudence indicates that the final element listed above has changed since Taylor was rendered. In O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 116 S.Ct. 1307 (1996), the United States Supreme Court found the plaintiff in an age discrimination case no longer has to establish that he was replaced by a person outside the protected class. The Court concluded that the plaintiff's prima facie case requires evidence creating an inference 'that an employment decision was based on a[n] [illegal] discriminatory criterion...' Id. at 313; 1310 (emphasis omitted)(alterations original)(quoting Teamsters v. United States, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866 (1977)).

Furthermore, in O'Connor, the Supreme Court adopted the burden of proof allocation applicable to Title VII discrimination cases for age discrimination claims. This allocation, previously set forth in the Title VII context in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), was explained by the Court as follows:

Once the plaintiff has met this initial burden [of demonstrating a prima facie case], the

burden of production shifts to the employer 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Ibid, If the trier of fact finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, the court must enter judgment for the plaintiff. St. Mary's Honor Center, supra, at 509-510, and n. 3, 113 S.Ct., at 2748-1749, and n.3; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).

O'Connor, 517 U.S. at 311; 116 S.Ct. at 1309.

In support of their motion for summary judgment, the defendants presented McCain's progress reports demonstrating 'improvement needed' ratings and correspondence perpetuated during the evaluation process. The defendants also attached the civil service board's findings of fact wherein the board concluded that McCain's performance had not sufficiently improved in the areas found to be deficient in the evaluations and that his termination was for cause. Furthermore, the defendants presented the depositions of John Raines and Aros Mouton. Raines' deposition reveals a singular incident wherein he felt that McCain had made misrepresentations in order to obtain a secretary. In the excerpts of his deposition, Mouton's testimony reveals that he

felt McCain's inability to get along with his superior, Raines, outweighed any of McCain's technical ability. We conclude the defendants' showing demonstrates the existence of legitimate reasons for McCain's dismissal.

Faced with similar evidence on a motion for summary judgment in Stults, 76 F.3d 651, the Fifth Circuit considered the defendants' demonstration in light of the presumption of discrimination discussed above. The court stated:

In a discrimination case, the plaintiff's prima facie case created a rebuttable presumption of discrimination that shifts the burden of production to the defendant to articulate a legitimate, nondiscriminatory reason for the questioned employment action. Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1505 (5th Cir. 1988). With its motion for summary judgment, Conoco submitted evaluations and termination reports regarding both Stults and Wallace that supported its claim that the plaintiff were terminated for performance deficiencies. In addition, Conoco submitted portions of relevant depositions that demonstrated the lack of evidence that its nondiscriminatory reasons were mere pretext or that its nondiscriminatory reasons were mere pretext or that its employment actions were actually motivated by age discrimination. Given this showing, we must agree with the district court that Conoco adequately

demonstrated the absence of a material fact issue on the plaintiffs' age discrimination claims.

When the employer articulates a legitimate nondiscriminatory reason, and produces competent summary judgment evidence in support, as Conoco did in this case, the presumption created by the prima facie case disappears and 'the burden reverts to the plaintiff to prove that the employer's reason[] [is] pretextual.' Moore, 990 F.2d at 815 (quoting Normand v. Research Inst. of Am., Inc., 927 F.2d 857, 859 (5th Cir. 1991). 'The trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not the real reason for the discharge.' Guthrie v. Tifco Industries, 941 F.2d 374, 377 (5th Cir. 1991), cert. denied, 503 U.S. 908, 112 S.Ct 1267, 117 L.Ed.2d 495 (1992).

The plaintiff at all times retains the burden of persuading the trier of fact that impermissible discrimination motivated the adverse employment decision. Bienkowski, 851 F.2d at 1505...

Id. at 656-58 (emphasis added).

As the defendants satisfied the burden required to sustain the motion for summary judgment, the burden then shifts to McCain to demonstrate that any legitimate reason for

dismissal was pretextual. Stults, 76 F.3d 651. In opposition to the motion for summary judgment, McCain submitted the deposition testimony of his superiors wherein they discussed reasons for his termination and reasons why demotion was not an option. Further, McCain submitted correspondence demonstrating difficulties in his working relationship with Raines. Neither the depositions nor the correspondence indicate that McCain was terminated due to his age. McCain did, however, present an excerpt from the deposition of his replacement, Tom Carroll, for the proposition that he was replaced by a younger person and the deposition testimony of Horace Rickey, an unsuccessful applicant for McCain's former position who was older than McCain. We do not conclude that this evidence is sufficient to create a genuine issue of material fact with regard to the motivation behind McCain's removal. In fact, due to the documented difficulty in the relationship between Raines and McCain, much of McCain's submission supports the defendants' assertion that legitimate reasons existed for the City's action.

Although we have concluded that the lower court erred in some respects in finding no subject matter jurisdiction, we conclude that the motion for summary judgment was properly granted as the plaintiff failed to satisfy the requisite burden of establishing the existence of a genuine issue of material fact."

(Third Circuit Slip Opinion at Pages 15-19, Emphasis in Original).

Judge Peters respectfully dissented from the opinion of Judge Amy and Judge Gremillion, finding "...there are genuine issues of material fact which must be resolved by further trial proceedings."

Thereafter, an Original Application for Writ of Certiorari was filed on behalf of Howard Mitchell McCain, Jr. On September 17, 1999, the Supreme Court of Louisiana denied Howard McCain's writ application.

This writ application follows.

FACTUAL HISTORY

The material facts pertinent to this writ are not in dispute. The plaintiff was employed with The City of Lafayette for the periods set out before. However, for background purposes, we would note the following being of record in this matter.

Howard Mitchell McCain was born on August 5, 1935 and was 59½ years old when terminated in January of 1995 with the City of Lafayette. (McCain Depo, 8).

In May of 1978, Howard McCain became employed with the City of Lafayette in the capacity as City Engineer. (McCain Depo, 9). He continued in this capacity until he was promoted to the Office of Capital Improvements Manager by Mayor Kenneth Bowen in March of 1993. After his appointment, John Raines was appointed to the job of Director of Public Works in April of 1993.

John Raines' birthdate is December 1, 1951. Accordingly, he would have been 41 as of the time of his appointment to the job of Director of Public Works. (Raines Depo, 6).

A performance evaluation was due on an annual basis to evaluate the performance of employees including Howard McCain. Howard McCain's evaluation would have been due in May of 1994 as that would have been the anniversary of his employment. That fact is undisputed. It is shown in both the depositions of Howard McCain as well as John Raines. No performance evaluation was done by John Raines when it was due in May of 1994, however.

Instead, on July 7, 1994, Chief Administrative Officer Aros Mouton directed a routing and request slip to John Raines directing John Raines to fire Howard McCain as is shown in Exhibit "A" to the deposition of Aros Mouton. Thereafter, an out of time performance evaluation was performed by John Raines dated August 8, 1994, three months after the performance evaluation was due, and was supplied to Howard McCain on August 17, 1994. The overall evaluation noted "improvement needed". Thereafter, three successive thirty day evaluations were done of Howard McCain by John Raines. All were regarded as "unsatisfactory". In December of 1994, John Raines recommended the termination of Howard McCain. This was only seven months before his slotted retirement after seventeen years of excellent performance with the City of Lafayette.

In December of 1994, John Raines recommended the termination of Howard McCain. Howard McCain requested that in lieu of termination he simply be demoted to his

previous job of City Engineer, which he had performed in such an outstanding fashion for the course of fifteen years that he actually received the promotion to Capital Improvements Manager. This request for demotion was resisted by John Raines. However, Aros Mouton, the then Chief Administrative Officer, Kenneth Bowen, the then Mayor, and Kenneth
Joseph Mouton, the then Division Head of Employee Relations, all thought this request for demotion was "reasonable".

Aros Mouton testified at pages 46 through 49 of his deposition that he thought it was reasonable for Howard McCain to be offered his old job as City Engineer, but had the incorrect independent recollection that the job opportunity was actually afforded to Howard McCain. It clearly was not.

Kenneth Joseph Mouton was the Division Head of Employee Relations in charge of Human Resources and EEO issues at the time of the termination of Howard McCain. When asked about the appropriateness of demotion to the job of City Engineer, Kenneth Joseph Mouton testified as follows:

> "Q. From this vantage point now, did you agree with the recommended termination that came four (4) months later?
>
> A. Did we agree with it? I think we made a pitch to maybe demote him or find another place for him. but that was not our decision. It was just like a recommendation. We do that all the time, yeah.

Q. That's reasonable?

A. Yeah. Especially for those type of -- His was not for being -- what we can misconduct, but it was for a substandard performance. So, we attempt to recommend other places they could be placed if there is a place available. If there's no place available, then termination is the only other outlet.

Q. It would seem to me -- And this is not really a question. This is a predicate. The question will follow it. It would seem to me that if Mr. McCain had performed as a city engineer for fifteen (15) years to some level of proficiency that he gets promoted to the Capital Improvements manager, that he would, if he didn't perform well at the Capital Improvements manager position, still be a candidate for working as a city engineer with the city. Is that the kind of thought process you had that was behind your recommendation of demotion?

A. You see -- What was available? You see, he was -- He was the CI manager. We were looking at another engineering spot. And I think we thought if somebody would move into CID to replace him, then he would -- then could be demoted into that other spot.

Q. Right. Like, for instance, Tom

Carroll, city engineer, he moves up. You recommendation was that it was reasonable to put Mr. McCain back to city engineer?

A. To -- What was it called? I forgot the -- The official title was what? Public project or something engineer, yeah.

Q. That was your reasonable --

A. I think he had been there before.

MR. MCCAIN: Public Works city engineer for fifteen (15) years. That was a long time ago.

THE WITNESS: Yeah. I think that was the spot we were looking at as a potential.

Q. (By Mr. Iles) Who else joined you in the recommendation of demotion to that position?

A. Probably Jim Pollock.

Q. Jim Pollard?

A. Pollock." (Mouton Depo, 15-17).

In terms of the availability of demotion, Mayor Bowen testified as follows:

"Q. Okay. Let me ask you this, because it occurs to me there is some middle ground.

How come Mr. McCain couldn't be demoted back to the job of City Engineer or staff engineer?

A. I don't know. I don't think Howard accepted that offer as a compromise, as I recall. I don't recall the issue. But he would have to tell you that. I don't recall him accepting the compromise.

Q. Okay, let me ask you this, then, and I'll ask it in a different way. That was a bad question. Wouldn't it have been reasonable for you all--

A. I was amenable.

Q. And just so we're on the same page, you had been amenable to demoting Howard so he is no longer in the bad infrastructure that you have described?

A. He could have been in there, but he wouldn't have the authority and the responsibility that he had with his job." (Bowen Depo, 38-39).

Additionally, the Mayor testified as follows:

"Q. He [McCain] was competent in your judgment?

A. Oh, yes, sir. As is Tom Carroll, by the way, in my opinion.

Q. And Mr. McCain, in your opinion?

A. Yeah, sure. It wasn't an issue of competency. My being here today has nothing to do with the issue of this man being competent?

Q. It has to do him getting along with John Raines?

A. That was it and arguing and he ain't -- What is the old saying? The boss is not always right, but he is always the boss.

Q. But through it all, even after you decided to accept John Raines' recommendation to terminate him, you felt that he would have been an appropriate candidate for a lesser job; is that correct?

A. I would have considered that as it was conjured up, and I think -- I don't know this, but I think it came from downstairs with his dear friend Lee Eilers being able to take and conceivably help him to retain something. But Howard was a man in my recollection that did not want that.

Q. You thought it was reasonable?

A. It would have been reasonable to consider that. But if the man didn't want that, you can't give it to him; it is caster oil to him.

Q. I understand.

A. Good." (Bowen Depo, 47-48).

Following the termination of Howard Mitchell McCain from his job as Capital Improvements Manager, he was replaced by Thomas Roberson Carroll, III who has been selected by John Raines. At the time, Mr. Carroll would be 42 years old. Mr. Carroll's credentials were that he had graduated from Opelousas High School, had gone to USL from 1970 until 1974, graduated in Civil Engineering, and worked for the City as an Interim Project Engineer from September of 1991 until the Spring of 1993 when he was promoted to City Engineer. That would have corresponded with Howard McCain's promotion from City Engineer to Capital Improvements Manager. Howard McCain was promoted to the position of Capital Improvements Manager. Mr. Carroll was actually appointed in December of 1994 to Interim Capital Improvements Manager and was given the official position in April or May of 1995. (Carroll Depo, 6-8).

When testing for the position, Mr. Carroll had scored a 100. (Carroll Depo, 9).

There was one other applicant for the job of Capital Improvements Manager when Howard McCain was suspended. That individual would have been Horace Bushnell Rickey, Jr. On the same test, Mr. Rickey had a scored 105. (Rickey Depo, 16). Furthermore, Mr. Rickey had education and experience including being a Jesuit High School graduate in New Orleans, college at Tulane, University of Wyoming, UCLA, and LSU. He has degrees in Civil Engineering as well as Architectural Engineering. He is a licensed Civil

Engineer and Environmental Engineer. He is also a licensed surveyor. (Rickey Depo, 5-7).

Despite a higher score on the part of Horace Rickey and a vast amount of experience as a civil, architectural and environmental Engineer, Horace Rickey had one draw back. He was 69 years old at the time of the application. He did not get the job.

We know that Howard McCain performed his job as City Engineer in a satisfactory manner, and to the point where he was promoted to Capital Improvements Manager. There, Howard McCain was owed an evaluation in May of 1994 as to his performance as Capital Improvements Manager. He did not receive that performance evaluation. However, the decision was made on July 7, 1994 to fire Howard McCain. Thereafter, for the first time in the history of his employment with the City of Lafayette, Howard McCain received an "improvement needed" overall evaluation.

Mr. McCain disputed each and every area complained of by John Raines in a formal submission made to the City of Lafayette. His reply went unanswered. Thereafter, in the next three consecutive evaluations, Howard McCain was again given unsatisfactory rankings and recommended for termination.

Because Howard McCain had previously functioned as City Engineer in such a proficient fashion that it warranted promotion, and because the City Engineer job had become available by virtue of the promotion of Tom Carroll, Howard McCain asked for his old job back. Though all involved except John Raines believed that was reasonable, this request was refused. Howard McCain was instead terminated within

seven months of his slated retirement.

After Howard McCain's termination, another older individual applied for the job of Capital Improvements Manager. That individual possessed a higher score in the application process as well as a vast amount of experience. The promotion was refused to this individual who was 69 years old, and given to a 42 year old man who had only one year of experience as a City Engineer with the City of Lafayette.

Furthermore, the job of City Engineer that was requested by Howard McCain was given to a 34 year old man, Mitch Wyble. (Carroll Depo, 40; Raines Depo, 174-175). (Plaintiff's Opposition to Motion for Summary Judgment, Pages 7-13).

REASONS FOR GRANTING THE PETITION

In the instant decision, there is no doubt that Howard McCain prevailed in demonstrating a prima facie case of discrimination on the part of his employer, the City of Lafayette, in that McCain demonstrated:

(1) He was in a protected age group between the ages of 40 and 70,
(2) His employment with the defendant was involuntarily terminated,
(3) He was qualified to perform the job that he was employed to perform, and
(4) He was replaced by a person outside the protected age group comprising individuals between the ages of 40 and 70.

In O'Connor v. Consolidated Coin Caterers Corporation, supra, this Honorable Court made it clear that the plaintiff no longer has to establish that he was replaced by a person outside the protected class. However, in this case, the plaintiff was protected by a person substantially younger, and the refusal to return Mr. McCain to his former position was discriminatory, and the individual that filled that vacant position sought by McCain, that being Mitch Wyble, was outside the protected category, being 34 years of age.

Considering the evidence presented by Mr. McCain and the factors set out by this Honorable Court, the Louisiana Appellate system failed the plaintiff in his congressionally protected rights. Accordingly, it is prayed that this Court grant this writ of certiorari, and eventually reverse the Appellate Court, and return this matter to the District Court for a trial on its merits. To do otherwise would allow for an

unlawful weighing of contradictory evidence in violation of this Honorable Court's trilogy of decisions on a Motion for Summary Judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), Celetex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and Matsushita Electric Industrial Company v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

CONCLUSION

Howard McCain produced substantial evidence demonstrative of discrimination in violation of his congressionally protected rights against age discrimination, and was successful in producing substantial evidence demonstrative of a pretext for his termination. Accordingly, the Louisiana Appellate Courts should be reversed and this matter remanded for a merit trial on the claimant's federally protected rights.

Respectfully submitted:

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November 16, 1999

APPENDIX

APPENDIX A

THE SUPREME COURT OF THE STATE OF LOUISIANA

HOWARD MITCHELL MCCAIN, JR.

VS. NO. 99-C-1578

THE CITY OF LAFAYETTE, ET AL

IN RE: McCain, Howard Mitchell Jr.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Lafayette 15th Judicial District Court Div. "D" Number 95-3770-1A; to the Court of Appeal.

September 17, 1999

Denied.

BJJ
PFC
WFM
HTL
CDK
JTK

TRAYLOR, J. not on panel.
Supreme Court of Louisiana
September 17, 1999

Rai T. Daigle
Deputy Clerk of Court For the Court

APPENDIX B

"NUMBER 98-1902

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

HOWARD MITCHELL MCCAIN, JR.
PLAINTIFF-APPELLANT

VERSUS

THE CITY OF LAFAYETTE, ET AL
DEFENDANTS-APPELLEES

On appeal from the Fifteenth Judicial District Court, Docket number 95-3770, Parish of Lafayette, State of Louisiana, the Honorable Edward D. Rubin, District Judge, presiding.

Before PETERS, AMY and GREMILLION, Judges.

AMY, Judge.

The plaintiff filed suit in district court asserting that the City of Lafayette and his superiors wrongfully discharged him from his employment with the city due to his age. Upon motion for summary judgment by the defendants, the lower court concluded that the age discrimination statute under which the suit was filed did not permit such an action against the individual defendants and, therefore, dismissed them from the suit. Furthermore, the lower court concluded that no subject matter jurisdiction existed for the civil suit as the discrimination action stemmed from the plaintiff's removal

from office and, therefore, the matter had to first be raised before the civil service board. The plaintiff appeals both aspects of this two-fold judgment. For the reasons which follow, we affirm.

Factual and Procedural Background

The plaintiff in this matter, Howard Mitchell McCain, Jr., was employed by the City of Lafayette as the Capital Improvements Manager in 1993-1994. The record indicates that, following several evaluations indicating that areas of his job performance needed improvement, McCain's employment was terminated effective January 3, 1995. McCain, who was fifty-nine at the time, alleges that he was only several months from retirement when he was discharged.

Following the termination, McCain appealed the discharge to the Lafayette Municipal Government Employees Civil Service Board. Following hearings that lasted several days and included the calling of witnesses, the civil service board concluded that the discharge was made in good faith and that cause existed for the termination. There is no indication in the civil service board's findings of fact that an allegation of age discrimination was placed at issue by the plaintiff.

On August 25, 1995, the plaintiff filed a petition instituting the case sub judice alleging that the City of Lafayette discriminated against him due to his age. He sought recovery pursuant to La.R.S. 23:971, et seq. The City of Lafayette was named as a defendant as were Kenneth Bowen, Mayor of the City of Lafayette, Aros Mouton, Chief Administrative Officer, and John Raines, the Director of Public Works. Raines was the plaintiff's direct supervisor.

The petition indicates that the plaintiff sought compensation for loss of sick leave/pay, vacation time, retirement, income deferment, retirement program contributions, and business reputation. Additionally, McCain sought general damages.

In July, 1998, the defendants filed a motion for summary judgment. In a supporting memorandum, the defendants first asserted that a suit pursuant to La.R.S. 23:971, et seq. could not be brought against the individual supervisors. Next, the defendants alleged that the district court did not have subject matter jurisdiction to hear any age discrimination suit against the City as McCain failed to initially raise the issue before the civil service board. Finally, the City argued that, even if the district court was found to have subject matter jurisdiction, the plaintiff would be unable to prove that he was discharged due to age discrimination. In support of this motion for summary judgment, the defendants filed depositions and affidavits from the individuals involved as well as related documents, including the evaluations and correspondence between the parties relating to the evaluations/termination process. In opposition, the plaintiff filed deposition excerpts and memoranda related to the parties' working relationship.

The lower court found in favor of the defendants. In a minute entry detailing the reasons for ruling, the lower court concluded that La. Const. art. X, § 12 granted original jurisdiction in the civil service board since the cause of action stemmed from the plaintiff's removal and that, since the plaintiff failed to pursue the issue before the civil service board, he was precluded from bringing it before the court.

The plaintiff appeals assigning the following as error:

1. The District Court erred in dismissing the individual defendants as this Court of Appeal has not adopted the holdings of the United States Fifth Circuit Court of Appeal in disallowing individual defendants in an Age Discrimination in Employment Act claim.

2. The District Court erred in granting The City of Lafayette's Motion for Summary Judgment finding that civil service remedies are exclusive remedies which displace rights under the Age Discrimination in Employment Act and under the Louisiana Age Discrimination in Employment Act.

Discussion

This matter is on appeal following summary judgment, La.Code Civ.P. art. 966(A)(1) provides that a party may move for summary judgment any time after the filing of the answer. Article 966(B) requires that summary judgment be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." Furthermore, La.Code Civ.P art. 966 (C)(2) provides as follows:

> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to he court

> that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

An appellate court's review of a summary judgment is de novo and employs the same criteria considered by the lower court. Kumpe v. State, 97-386 (La. App., 3 Cir. 10/8/97), 701 So.2d 498, writ denied, 98-0050 (La. 3/13/98); 712 So.2d 882. Mindful of this standard, we turn to the issues presented for review.

Individual Liability

Although no reasons are explained in the reasons for ruling, the judgment signed by the lower court dismissed the individual defendants. Bowen, Mouton, and Raines, from the suit. The defendants' memorandum supporting the motion for summary judgment contains the argument that the analogous federal law precludes an age discrimination claim against individual defendants. In his first assignment of error, the plaintiff maintains that the court's reliance on federal law is misplaced. McCain contends that "our State version of the Louisiana Age Discrimination in Employment Act is not meant to mirror that of the Federal Rule." Furthermore, he contends that the jurisprudence of this circuit, namely Taylor v. Oakbourne Country Club, 95-388 (La. App 3 Cir. 10/4/95); 663 So.2d 379, indicates that an action under the Louisiana statute may be maintained against individual defendants.

McCain filed suit under La.R.S. 23:971, et seq. At the time of the actions at issue, these statutes created a cause of action for age discrimination by an employer.1 The following definition is provided for "employer":

1 LaR.S. 23:971, et seq. was repealed in 1997. Similar provisions are now found in La.R.S. 23:311, et seq. which are located in a chapter entitled "Prohibited Discrimination in Employment".

> §971. Definitions
>
> For the purposes of this Part, the following terms shall have the definitions as ascribed below unless the context indicates otherwise:
>
> (1) "Employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. The term also means any agent of such person...

At issue in this assignment is whether the phrase "agent for such person..." includes individual supervisors. The defendants maintain that the definition cannot includes these individuals as federal courts have interpreted a similar federal provision as not including these supervisors.

Upon comparison, the federal statute referenced by the

defendants prohibits an employer from discriminating against an individual due to age and provides a substantively similar definition of "employer". 29 USC §630(b) contains the following definition:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) *any agent of such a person*, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(Emphasis Added). In Stults v. Conoco, 76 F.3d 651 (5th Cir 1996), a panel of the United States Court of Appeals, Fifth Circuit concluded that the definition does not permit a cause of action against individual supervisors who do not otherwise qualify as an employer. Rather, the Fifth Circuit cited a Fourth Circuit case wherein it was reasoned that imposition of liability would place a heavy burden on personnel decisions and the following interpretation was offered: "Instead, we read § 630 (b) as an unremarkable expression of respondeat superior - that discriminatory personnel actions taken by an employer's agent may create liability for the employer.'" Id. at 655, quoting Birkbeck v. Marvel Lighting Corp., 30 F.3d

507, 510-11 (4th Cir.), cert. denied, 513 U.S. 1058, 115 S.Ct. 666 (1994).

While the plaintiff argues that the lower court should not have relied upon federal jurisprudence interpreting a federal statute, related federal law is commonly used as guidance by courts of this state in interpreting discrimination statutes. See King v. Dunbar, 97-2519 (La. App 4th Cir 6/3/98); 716 So.2d 104, writ granted, _ So.2d _ (La. 11/25/98); Craven v. Universal Life Ins. Co., 95-1168 (La. App. 3 Cir. 3/6/96); 670 So.2d 1358, writ denied, 96-1332 (La. 9/27/96); 679 So.2d 1355. Thus, considering applicable federal law, we find no legal error in the lower court's conclusion that La.R.S. 23:671, et seq. does not include a cause of action against individual supervisors.

As for the plaintiff's assertion that this court has previously approved a cause of action against individual supervisors in Taylor, 95-388; 663 So.2d 379, we find this argument to be without merit as well. In Taylor, a plaintiff brought an age discrimination claim against both his supervisor and the country club at which he worked. At the district court level, summary judgment as entered in favor of the defendants. A panel of this court concluded that genuine issues of material fact remained as to whether the plaintiff was discharged due to his age and reversed the summary judgment. Although the decretal paragraph in that opinion indicates the summary judgment was reversed in favor of both the country *and the supervisor*, and cots were assigned to each, the issue of whether the individual supervisor was an appropriate defendant does not appear to have been raised. In any event, the issue was not addressed in Taylor. Furthermore, this case relied upon by the plaintiff also stands for the proposition that federal law may be used as guidance

by Louisiana courts in interpreting related discrimination statutes. As explained above, pertinent federal case law indicates that the age-discrimination statutes do not provide a cause of action against individual supervisors.

Subject Matter Jurisdiction

In his next assignment of error, McCain argue the lower court erred in determining that it lacked subject matter jurisdiction to hear the age discrimination matter due to his failure to bring the issue before the civil service board. McCain asserts that his suit brought under the age discrimination statute permits damages that could not have been awarded by the civil service board and, therefore, the board is not afforded original jurisdiction over the matter.

La.Const. art. X § 12 provides for the jurisdiction of the civil service board as follows:

> **(B) Cities.** Each city commission established by Part I of this article shall have the exclusive power and authority to hear and decide all removal and disciplinary case, with subpoena power and power to administer oaths. It may appoint a referee to take testimony, with subpoena power and power to administer oaths to witnesses. The decision of a commission shall be subject to review on any question of law or fact upon appeal to the court of appeal wherein the commission is located, upon application filed with the commission within thirty calendar days after its decisions becomes final.

The minute entry containing the lower court's reasons for ruling reflect the following:

> The Court finds that it lacks the jurisdiction to hear the instant suit. Under Article X, Sec. 12(B) of the Louisiana Constitution of 1974, a city civil service board has exclusive original subject matter jurisdiction over all removal and disciplinary cases. Myers v. Ivey, 635 So.2d 632 (La. App 3 Cir. 1994); Eubanks v. City of Opelousas, 590 So.2d 740 (La. App. 3 Cir. 1991). Plaintiff's case involves his alleged wrongful removal from a position with the **CITY OF LAFAYETTE**; therefore, the Lafayette Municipal Government Employees Civil Service Board has exclusive original subject matter jurisdiction over his case. Since plaintiff failed to raise the issue of age discrimination in front of the Civil Service Board he cannot be allowed to now raise it for the first time in front of this Court.
>
> Plaintiff argues that this is not an appeal from the Civil Service Board decision but an independent action seeking money damages which cannot be awarded by the Civil Service Board. However, in order for a state employee to maintain a suit for money damages in district court based upon his wrongful termination, he must first be successful in appealing his dismissal to the Civil Service Board. Reimer v. Medical Center of Louisiana at New Orleans, 688 So.2d 165 (La. App. 4 Cir. 1997); Hillard v.

> Housing Authority of New Orleans, 436 So.2d 685 (La. App. 4 Cir. 1983). Plaintiff was not successful in his appeal; therefore, [he] cannot bring a suit for damages based upon his termination before this Court.

The defendants maintain that the lower court's position was correct. They assert that it is the plaintiff's "removal" that is at issue and, therefore, the exclusive jurisdiction provision of Article X, Section 12 is at work in this case. According to the defendants' argument, the classification of this claim as a "tort" for which general damages are recoverable is irrelevant to the jurisdiction issue. Rather, the defendants appear to argue that since the civil service board had the power to consider the issue of age discrimination, the fact that the civil service board could not award the type of damages did not preclude the necessity of raising the issue before the board.

As urged by the defendants, McCain's "removal" from his position with the City of Lafayette is at the root of his age discrimination claim. At first glance, this core issue would appear to place original jurisdiction with the civil service board pursuant to Article X, § 12. In Reimer v. Medical Center of Louisiana, 95-2799 (La. App. 4 Cir. 1/29/97); 688 So.2d 165, a discharged employee of the defendant medical center filed suit in district court for retaliatory discharge and discrimination based upon a handicap or disability. The fourth circuit rejected the plaintiff's contention that the subject matter jurisdiction existed in the district court since his action had a specific statutory basis, La.R.S. 46:2254 and La.R.S. 51:2242. The Court states as follows:

> Mr. Reimer claims that he is a civil servant

> whose removal was wrongful and not for the reason stated. that his petition makes reference to other statutes does not changes the nature of his claim. The authority to review the basis for a termination of a civil servant's employment and decide whether it was in accordance with law is expressly and unambiguously assigned to the CSC, subject to the right of judicial review, in Section 12(A) of Article X.

Id. at p. 4; 168 (citation omitted). The court also rejected the plaintiff's alternative argument that concurrent jurisdiction existed between the forums.

Further, in Reimer, the fourth circuit also rejected the plaintiff's argument that the district court was the proper forum since he sought a money judgment and not a reinstatement. The court stated as follows in his regard:

> Mr. Reimer's removal is at the heart of his suit. In order for him to be entitled to damages it must be determined that the was unlawfully discharged from his position.
>
> Mr. Reimer is correct that the CSC cannot award general tort damages, such as for injury to reputation or an invasion of privacy. See e.g., Greenleaf v. DHH, Metropolitan Developmental Center, 594 So.2d 418 (La. App. 1st Cir. 1991), writ denied, 596 So.2d 196-97 (La. 1992), and cases cited therein. The CSC could, however, in addition to an award of costs and attorney fees, award back

> pay and order that all benefits and emoluments of office be restored to Mr. Reimer. Blappert v. Department of Police, 94-1284, pp. 6-7 (La. App. 4th Cir., 12/15/94), 647 So.2d 1339, 1343. If such an award would be inadequate to fully compensate Mr. Reimer for the harm suffered, he then could assert his claim in Civil District Court. Hilliard, 436 So.2d at 687.

Id. at p 6-7; 169.

Similarly, a panel of this court in Myers v. Ivey, 93-1166 (La. App 3 Cir 4/6/94); 635 So.2d 632, found that an employment suit in tort, for intentional infliction of emotional distress, could not first be filed in district court. The court stated as follows:

> Myers attempts to circumvent the exclusive jurisdiction of the City Civil Service Commission by filing this tort action against his supervisors and the department alleging a conspiracy to intentionally inflict emotional distress. Myers has cited no cases, nor have we found any, which allow such an independent action in district court. The entire thrust of the exclusive jurisdiction grant is to preclude district courts from having concurrent jurisdiction with the Civil Service Commissions over classified civil service employer-employee disputes that are employment related. Foreman v. Falgout, 503 So.2d 517 (La. App. 1st Cir. 1986).

Id. at 633.

However, in Landrum v. Board of Commissioners of the Orleans Levee District, 95-1591 (La. App. 4 Cir. 11/27/96); 685 So.2d 382, the fourth circuit concluded that an employment-based tort suit against a government body could be brought in district court. The plaintiff in Landrum was a police officer whose employment was terminated due to the results of a drug test. Although he appealed the termination to the Civil Service Commission, the parties reached an agreement wherein the employer reinstated the plaintiff, provided back pay and generals, and removed the records of the disciplinary action from his personnel file. In exchange, the plaintiff resigned from his position. Subsequently, the plaintiff filed a civil suit alleging intentional/negligent infliction of emotional distress, defamation, and invasion of privacy. The district court overruled the employer's exception of subject matter jurisdiction. On appeal, the fourth circuit affirming the finding of subject matter jurisdiction concluding that, due to his voluntary resignation, the plaintiff had no claim against his employer arising from his previous suspension or removal. the fourth circuit stated:

> The constitutional provision that grants judicial authority to the Commission is narrowly construed since it is an exception to the general rule that district courts have jurisdiction over all civil matters. Greenleaf v. Metropolitan Developmental Center, 594 So.2d 418, 425 (La. App 1st Cir. 1991) [citing In Re Investigation of Smith, 546 So.2d 561, 563 (La. App. 1st Cir.), writ denied 550 So.2d 636 (La.1989)], *writ denied*, 596 So.2d 196 (La.1992). The Civil Service Commission

> does not have jurisdiction of tort cases nor can it award monetary damages for tortious conduct. *Greenleaf*, 594 So.2d at 425; *see also Moore v. Board of Supervisors of L.S.U.* 559 So.2d 548 (La.App. 2nd Cir. 1990). Under the circumstances of this case, Mr. Landrum's tort claims are not an attempt to circumvent the exclusive jurisdiction of the Civil Service Commission; he may look to the courts for damages for defamation and other torts arising out of the facts alleged here. *Moore, supra; Manale v. City of New Orleans*, 673 F.2d 122 (5th Cir. 1982); *see also Greenleaf, supra*. For this reason, the trial court correctly overruled the exception to its subject matter jurisdiction.

Id. at p. 4-5; 387.

The subject matter jurisdiction issue was recently raised before the first circuit in *Crockett v. State Through Department of Public Safety and Corrections*, 97-2528 (La.app. 1 Cir. 11/6/98); 721 So.2d 1081. The plaintiff in the first circuit matter was employed as a correctional officer at the Louisiana State Penitentiary. He filed suit is district court seeking damages for mental anguish related to a body cavity search he underwent. The trial court granted the employer's exceptions of subject matter jurisdiction and prematurity. The first circuit reversed the judgment finding that the plaintiff did not establish that his suit was one for either removal or disciplinary action. The first circuit then focused upon the employer's claim that even if the plaintiff's claim "is outside the exclusive jurisdiction of the Commission, he must pursue and not abandon his civil service

administrative remedy before bringing a tort action in district court." *Id.* at 6; 1084. The court observed as follows:

> Because the allegations of Crockett's petition set forth a tort claim and the Commission cannot grant the requested relief, Crockett cannot be required to have this matter addressed by the Commission before bringing his tort action in district court. When an exception of prematurity is brought on the ground that the plaintiff has failed to exhaust his administrative remedies, the exceptor has the burden of showing that an administrative remedy exists. Upon that showing, the burden shifts to the plaintiff to show that he has exhausted those remedies. *Kenner Firefighters Ass'n Local No. 1427 v. City of Kenner*, 96-361, pp. 5-6 (La.App. 5th Cir. 11/14/96); 685 So.2d 265, 268. Based on the record which indicates no evidence was introduced, we find that State has not established the existence of a meaningful administrative remedy. *See R.A.K. v. Board of Trustees of the State Employees Group Benefits Program, Department of Treasury*, 558 So.2d 633, 635 (La.App. 1st Cir. 1990). Thus, we reverse the judgment of the trial court granting the exception raising the objection of prematurity.

Id. at p. 6; 1084. While no exception of prematurity is at issue in the instant case, we consider the court's observation that, since the civil service commission could not grant relief for the tort damages sought, the plaintiff could not be expected to first raise his claim before the commission.

Although the above-referenced cases are useful guidance, we do not find that any of the jurisprudence squarely addresses the difficulties presented by the instant matter. Certainly McCain's removal from his position with the City, even if due to age discrimination, is at the heart of his civil suit. This would seem to indicate that La.Const. art. X § 12 provides for the civil service board to have jurisdiction over such a matter. Since a civil service board can hear claims related to removal, they should be able to decide claims for removal due to discrimination. However, while the board may be able to hear such a claim, the board is powerless to award the type of tort damages sought by the plaintiff. This factor has been presented in several of the cases discussed above.

In *Reimer*, 95-2799; 688 So.2d 165, the fourth circuit concluded that, if any award granted to the plaintiff by the civil service board was inadequate to compensate him for any injury, he could then assert his claim in district court. This reasoning is problematic as any cause of action that could subsequently be brought in district court could possibly prescribe while the defendant waited for the civil service board's resolution of the underlying removal issue. We find no jurisprudential or legislative authority indicating such a plaintiff's cause of action does not exist until the civil service board renders its decision or that prescription is suspended until such time. This can be seen to be especially problematic in instances where a civil service board finds no wrongful discharge. Under such a circumstance, it would appear that the plaintiff would have to first avail himself of his right to appeal the board's determination to the court of appeal. *See* La.Const.art. X, § 12. This process could obviously continue past the applicable prescriptive period for causes of action in tort. Due to this civil service process, an employee could lose

all damages that could not be awarded by a civil service board, *e.g.* general damages, simply because the cause of action had prescribed. We find nothing to suggest that a city employee has any less right to assert entitlement to damages for tortious conduct than one employed by a private employer.

Due to the above-noted complexity, we do not conclude that the civil service board has exclusive jurisdiction to hear those type of cases wherein the remedy sought could not be awarded by the board. In the petition instituting the present matter, the plaintiff sought damages due to loss of sick and vacation leave, health insurance, and retirement benefits. These appear to be the type of remedies that could be awarded to the plaintiff for wrongful termination even if for discrimination, by the civil service board. Thus, the civil service board would have been the appropriate place to seek recovery for these damages. We find no error in the summary judgment in this regard. However, the civil service board is powerless to award other damages sought by the plaintiff, *e.g.* general damages and loss of business reputation. In this regard, we conclude that the lower court had subject matter jurisdiction over these issues.

Since the lower court concluded that no subject matter jurisdiction existed, the judge never reached the defendants' alternative contention that, even if jurisdiction existed, the motion for summary judgment should be granted as no genuine issues of material fact exist. As summary judgments are reviewed *de novo*, we turn to this remaining assertion.

Summary Judgment - Genuine Issues of Material Fact

In their memorandum in support of summary judgment and again in their brief to this court, the defendants argue that

the plaintiff will be unable to carry the requisite burden of proof to recover for age discrimination. Principally, they maintain that no genuine issues of material fact remain with regard to whether McCain was discharged due to his age.

As previously explained, La.Code Civ.P. art. 966(C)(2) provides that a movant who will not be required to bear the burden of proving the issue before the court at trial, is not required, in a motion for summary judgment, "to negate all essential elements of the adverse party's claim, action or defense...." Rather, the movant must only "point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense." *Id.* After the movant has satisfied this burden, the adverse party must produce adequate *factual support* establishing that genuine issues of material fact exist for trial. La.Code Civ.P. art. 966(C)(2); La.Code Civ.P. art. 967.

In *Taylor*, 95-388; 663 So.2d 379, this court set forth the elements of an age discrimination suit by referencing those of the comparable federal statute. At the time of *Taylor*, a plaintiff was required to demonstrate that:

> (1) he was in the protected age group between the ages of forty and seventy,
> (2) his employment with the defendant was involuntarily terminated,
> (3) he was qualified to perform the job that he was employed to perform, and
> (4) he was replaced by a person outside the protected age group comprising individuals between the ages of forty and seventy.

Id. at p. 8; 384, *quoting Lege v. N.F. McCall Crews, Inc.* 625

So.2d 185, 187 (La.App. 3 Cir.) (citing *Belanger v. Keydril Co.* 596 F.Supp. 823 (E.D.La. 1984)), *writ denied*, 627 So.2d 638 (La.1993). Reference to recent federal jurisprudence indicates that the final element listed above has changed since *Taylor* was rendered. In *O'Connor v. Consolidated Coin Caterers Corp.* 517 U.S. 308, 116 S.Ct. 1307 (1996), the United States Supreme Court found the plaintiff in an age discrimination case no longer has to establish that he was replaced by a person outside the protected class. The Court concluded that the plaintiff's prima facie case requires evidence creating an inference "that an employment decision was based on a[n] [illegal] discriminatory criterion...." *Id.* at 313; 1310 (emphasis omitted)(alterations original)(quoting *Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866 (1977)).

Furthermore, in *O'Connor*, the Supreme Court adopted the burden of proof allocation applicable to Title VII discrimination cases for age discrimination claims. This allocation, previously set forth in the Title VII context in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), was explained by the Court as follows:

> Once the plaintiff has met this initial burden [of demonstrating a prima facie case], the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Ibid.* If the trier of fact finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, the court must enter judgment for the plaintiff. *St. Mary's Honor Center, supra*, at 509-510, and n. 3, 113 S.Ct., at 2748-1749, and n.3; *Texas Dept. of*

> *Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).

O'Connor, 517 U.S. at 311; 116 S.Ct. at 1309.

In support of their motion for summary judgment, the defendants presented McCains' progress reports demonstrating "improvement needed" ratings and correspondence perpetuated during the evaluation process. The defendants also attached the civil service board's findings of fact wherein the board concluded that McCain's performance had not sufficiently improved in the areas found to be deficient in the evaluations and that his termination was for cause. Furthermore, the defendants presented the depositions of John Raines and Aros Mouton. Raines' deposition reveals a singular incident wherein he felt that McCain had made misrepresentations in order to obtain a secretary. In the excerpt of this deposition, Mouton's testimony reveals that he felt McCain's inability to get along with his superior, Raines, outweighed any of McCain's technical ability. We conclude the defendants' showing demonstrates the existence of legitimate reasons for McCain's dismissal.

Faced with similar evidence on amotion for summary judgment in *Stults*, 76 F.3d 651, the Fifth Circuit considered the defendants' demonstration in light of the presumption of discrimination discussed above. The court stated:

> In a discrimination case, the plaintiff's prima facie case creates a rebuttable presumption of discrimination that shifts the burden of production to the defendant to articulate a

legitimate, nondiscriminatory reason for the questioned employment action. *Bienkowski v. American Airlines, Inc.* 851 F.2d 1503, 1505 (5th Cir. 1988). With its motion for summary judgment, Conoco submitted evaluations and termination reports regarding both Stults and Wallace that supported its claim that the plaintiffs wee terminated for performance deficiencies. In addition, Conoco submitted portions of relevant depositions that demonstrated the lack of evidence that its nondiscriminatory reasons were mere pretext or that its nondiscriminatory reasons were mere pretext or that its employment actions were actually motivated by age discrimination. Given this showing, we must agree with the district court that Conoco adequately demonstrated the absence of a material fact issue on the plaintiffs' age discrimination claims.

When the employer articulates a legitimate nondiscriminatory reason, and produces competent summary judgment evidence in support, as Conoco did in this case, *the presumption created by the prima facie case disappears and "the burden reverts to the plaintiff to prove that the employer's reason[] [is] pretextual"*. *Moore*, 990 F.2d at 815 (quoting *Normand v. Research Inst. of Am. Inc.* 927 F.2d 857, 859 (5th Cir. 1991). "The trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not the real reason for the

> discharge." *Guthrie v. Tifco Industries*, 941 F.2d 374, 377 (5th Cir. 1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1267, 117 L.Ed.2d 495 (1992).
>
> The plaintiff at all times retains the burden of persuading the trier of fact that impermissible discrimination motivated the adverse employment decision. *Bienkowski*, 851 F.2d at 1505....

Id. at 656-58 (emphasis added).

As the defendants satisfied the burden required to sustain the motion for summary judgment, the burden then shifts to McCain to demonstrate that any legitimate reason for dismissal was pretextual. *Stults*. 76 F.3d 651. In opposition to the motion for summary judgment, McCain submitted the deposition testimony of his superiors wherein they discussed reasons for this termination and reasons why demotion was not an option. Further, McCain submitted correspondence demonstrating difficulties in his working relationship with Raines. Neither the depositions nor the correspondence indicate that McCain was terminated due to his age. McCain did, however, present an excerpt from the deposition of his replacement, Tom Carroll, for the proposition that he was replaced by a younger person and the deposition testimony of Horace Rickey, an unsuccessful applicant for McCain's former position who was older than McCain. We do not conclude that this evidence is sufficient to create a genuine issue of material fact with regard to the motivation behind McCain's removal. In fact, due to the documented difficulty in the relationship between Raines and McCain, much of McCain's submission supports the defendants' assertion that

legitimate reasons existed for the City's action.

Although we have concluded that the lower court erred in some respects in finding no subject matter jurisdiction, we conclude that the motion for summary judgment was properly granted as the plaintiff failed to satisfy the requisite burden of establishing the existence of a genuine issue of material fact.

DECREE

For the foregoing reasons, the judgment of the lower court is affirmed. All costs of this appeal are assessed to the plaintiff, Howard McCain.

AFFIRMED

NUMBER 98-1902

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

HOWARD MITCHELL MCCAIN, JR.

Plaintiff-Appellant

VERSUS

THE CITY OF LAFAYETTE, ET AL

Defendants - Appellees

PETERS, J., concurring in part; dissenting in part.

I agree with the majority's opinion on every issue except that of the summary judgment. In my opinion, there are genuine issues of material fact which must be resolved by further trial proceedings. Thus, I would remand the matter to the trial court for further proceedings consistent with the other determinations of the majority opinion.

APPENDIX C

JUDGMENT

This matter came before this court on September 21, 1998, on a Motion for Summary Judgment filed by Defendants, with all parties represented by their respective counsel of record. Considering the memoranda, arguments, exhibits, and evidence submitted by counsel, and finding that there is no genuine issue as to material fact, and that Movers are entitled to judgment as a matter of law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed by Defendants, the City of Lafayette, John R. Raines, Aros G. Mouton, and Kenneth F. Bowen, is granted, and that all claims and demands of Plaintiff, Howard M. McCain, are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs are assessed to Plaintiff, Howard M. McCain.

READ, RENDERED AND SIGNED in Lafayette, Louisiana, this 24th day of September, 1998.

Edward D. Rubin
District Judge